COURT OF APPEALS DECISION DATED AND FILED

March 5, 2008

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2007AP2039-CR **Cir. Ct. No. 2007CT204**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHN E. GOBIS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waukesha County: J. MAC DAVIS, Judge. *Affirmed*.

¶1 ANDERSON, P.J.[1] John E. Gobis asserts that opinion information provided by the police officer who operated the Intoximeter after Gobis' drunk

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

driving arrest dissuaded him from seeking an alternate test under the implied consent law. Given that Gobis has failed to show the officer's statements influenced his ability to ask for an alternate test, we affirm.

¶2 After his arrest for second-offense drunk driving, Gobis filed a motion seeking to suppress the results of the Intoximeter, asserting that the Intoximeter operator frustrated his right to an alternate test. At the hearing, the State did not offer any evidence; however, Gobis testified on his own behalf.[2] Gobis testified that because the .20 percent blood alcohol content (BAC) result of the Intoximeter seemed high, based upon what he had to drink that night,[3] he asked the officer operating the Intoximeter—not the arresting officer—what alternate form of testing would be provided. When the Intoximeter operator said the blood test was the alternate test, Gobis testified he asked where it would be performed. In response, Gobis claims, the operator said "it would be the same type of result as the breath test, and that it really wouldn't be worth the time to go—to undergo a subsequent test." He concluded his direct examination by saying the response from the operator "dissuaded me from pursuing a test frankly. My concern was that if I did pursue down that path that the penalties for—for that may be more severe than just staying with the results of the breath test."

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[2] When compliance with the implied consent law, WIS. STAT. § 343.305, is challenged, the State has the initial burden to show, by a preponderance of the evidence, the arresting officer used methods that would reasonably convey the implied consent warnings. ***State v. Piddington***, 2001 WI 24, ¶22 n.11, 241 Wis. 2d 754, 623 N.W.2d 528. Then the burden shifts to the defendant to show (1) the officer misinformed the driver and (2) the officer's misinformation influenced the driver's ability to exercise his or her rights under the implied consent law. ***Id.***

[3] Gobis testified on cross-examination that he had three glasses of wine and four beers between 5:30 p.m. and 12:30 a.m.; however, he did not testify as to the number of ounces of each drink.

¶3 The trial court denied the motion:

> [T]he only reasonable conclusion any fact finder could make in this context is that the arresting police authority gave [Gobis] his right to alternate tests on this occasion, that's one.
>
> And, two, that he did not request the alternate test.
>
> And, three, which I guess is the main point of the motion is, the police did not do anything sufficiently improper to effectively prevent or substantially interfere with [Gobis] choosing to get one or two alternate tests. There is nothing illegal or sufficiently improper for the court to grant a motion like this.
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> And an officer saying a few sentences or a few phrases as, or a few statements as to why that officer didn't think it is worth it, it is not going to change anything to give some mild persuasion. There is no indication of improper persuasion, or improper activity, or overbearing conduct of any kind.
>
> So, the defendant has failed to present a reasonable basis for the Court to go further with this proceeding. And the motion is denied.

¶4 Consequently, Gobis entered a no contest plea to the charge of operating under the influence, second offense. *See* WIS. STAT. § 346.63(1)(a). He is now appealing the denial of his motion.[4]

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[4] We would apply the "guilty plea waiver rule" to this case and dismiss this appeal if the State had briefed the rule. The "guilty plea waiver rule" provides a voluntary plea of guilty generally waives all nonjurisdictional defects and defenses, including claims of constitutional violations occurring prior to the plea. WISCONSIN STAT. § 971.31(10) provides a narrow exception to this rule: "An order denying a motion to suppress evidence … may be reviewed upon appeal from a judgment of conviction notwithstanding the fact that such judgment was entered upon a plea of guilty." Sec. 971.31(10); ***State v. Pozo***, 198 Wis. 2d 705, 714, 544 N.W.2d 228 (Ct. App. 1995) (citations omitted). Suppression of the Intoximeter results is not a remedy where a defendant alleges noncompliance with the implied consent law. ***State v. Begicevic***, 2004 WI App 57, ¶¶26-28, 270 Wis. 2d 675, 678 N.W.2d 293. At the most, Gobis would have been entitled to pursue a motion seeking to prohibit the automatic admissibility of the test results. ***Id***. Gobis' remedy does not fall within the narrow statutory exception to the "guilty

(continued)

¶5 In ***State v. Begicevic***, 2004 WI App 57, ¶11, 270 Wis. 2d 675, 678 N.W.2d 293, we summarized our standard of review:

> Whether the officer used reasonable means to convey the necessary implied consent warnings, WIS. STAT. § 343.305(4), is a question of law that we review de novo. "To the extent the circuit court's decision involves findings of evidentiary or historical facts, those findings will not be overturned unless they are clearly erroneous." (Citations omitted.)

¶6 We accept the trial court's findings: (1) the officer gave Gobis his rights under the implied consent law, (2) Gobis did not request the alternate test, and (3) the officer told Gobis why the alternate test was not worthwhile. The question we review de novo is whether the Intoximeter operator's statement concerning the alternate test—"it would be the same type of result as the breath test, and that it really wouldn't be worth the time to go—to undergo a subsequent test"—dissuaded Gobis from requesting the alternate test.

¶7 An officer only has a duty to accurately provide the information on the Informing the Accused form. ***County of Ozaukee v. Quelle***, 198 Wis. 2d 269, 285, 542 N.W.2d 196 (Ct. App. 1995). The officer does not need to explain all of the choices on the form. ***Id.*** In ***Quelle***, we set forth a three-pronged inquiry to determine whether, under specific facts and circumstances, the arresting officer satisfied the statutory requirements. First, we ask whether the officer failed to meet or exceeded his or her duty to inform the accused driver pursuant to WIS. STAT. § 343.305(4). ***Quelle***, 198 Wis. 2d at 280. If so, we consider whether the lack or oversupply of information was misleading. ***Id.*** Finally, we ask whether the officer's failure affected the accused's ability to make a choice about whether

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plea waiver rule." If it had been properly briefed by the State, the rule would operate to bar this appeal.

to submit to the chemical test. ***Id.*** Whether the information has been reasonably conveyed is based on the officer's conduct and not on the subjective comprehension of the accused. ***State v. Piddington***, 2001 WI 24, ¶21, 241 Wis. 2d 754, 623 N.W.2d 528.

¶8 Assuming, without deciding, that the Intoximeter operator failed to meet his duty in giving information to Gobis, we still resolve the ***Quelle*** test against Gobis. Gobis testified why he did not seek an alternate test: "My concern was that if I did pursue down that path that the penalties for—for that may be more severe than just staying with the results of the breath test." Nothing the Intoximeter operator said to Gobis even hinted that an alternate test would result in more severe penalties, the only reason Gobis claims to have foregone that right.

¶9 We affirm because Gobis has failed to carry his burden. He has not connected his failure to request an alternate test to anything the Intoximeter operator said about the alternate test.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.